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In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The fact that 16 states, the District of Columbia, the cities of New York and Chicago, the EPA, a national health organization, and a number of energy companies all filed opposition briefs highlights that this is a tremendously important case with national consequences. EPA's unreasonable interpretation of "appropriate" in 42 U.S.C. § 7412(n)(1)(A) will cause Americans to spend $9.6 *billion* every year to achieve only $4 to $6 *million* in annual benefits from lower emissions of hazardous air pollutants (HAPs). Indeed, EPA itself does not dispute the case's importance, but instead simply previews its merits arguments.

On the merits, EPA's interpretation of the Clean Air Act is contrary to Congress's intent. Before EPA may regulate HAP emissions from electric utilities, it is required first to consider any health risks from those emissions and then to decide whether regulation would be "appropriate." By regulating electric utilities based on health risks alone, EPA failed to give the term "appropriate" any meaning.

The statutory scheme compels a conclusion opposite to EPA's. Congress decided to regulate certain sources based on numeric emission thresholds alone, without regard to cost. In contrast, Congress directed EPA to regulate electric utilities if "appropriate" *after* taking into account health risks, necessarily requiring EPA to look beyond health risks and to consider other key factors, including costs.

In *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457 (2001), the relevant statutory language—"protect[ing] the public health" with an "adequate margin of safety"—focused entirely on the benefits side of the cost-benefits balance, and so this Court reasonably concluded that Congress did not authorize EPA to consider the costs side of the balance. But here, Congress mandated that EPA first consider the health hazards to be reduced (i.e., the benefits of the rule) and then take the additional step of deter-mining if regulating is "appropriate." Rather than limiting EPA's discretion to one side of the balance, Congress thus directed EPA to look at costs too.

Due to the importance of the case and EPA's clear errors, this Court should grant the petition for a writ of certiorari.

ARGUMENT

I. EPA does not contest the importance of this case to the states and to consumers of electricity throughout the country.

EPA does not dispute that this is an important case. Instead, it notes that the decision below does not cause a circuit split. EPA Opp. 16. But of course a circuit split could not arise in this context, given that the D.C. Circuit has exclusive jurisdiction over any action challenging "any requirement under section 7412." 42 U.S.C. § 7607(b)(1). Indeed, Congress's grant of exclusive jurisdiction emphasizes the inherently national scope of this regulatory regime. And the participation of 39 states and the District of Columbia in this litigation further highlights the national importance of the case.

A. The inordinate, disproportionate costs of the rule warrant this Court's review.

Although EPA refused to consider costs when deciding whether it is appropriate to regulate HAPs emitted by electric utilities, the agency nevertheless estimated the costs and benefits of the final rule pursuant to Executive Order 1356, "Improving Regulation and Regulatory Review." 77 Fed. Reg. 9304, 9305–06 (Feb. 16, 2012). EPA acknowledged it could not monetize all the costs and benefits. For those costs it was able to calculate, it determined the "annual social costs" (i.e., the compliance costs for electric utilities) are $9.6 billion. *Id.* EPA also calculated that the annual benefits from reducing HAP emissions (i.e., the health benefits from reducing mercury in fish) to be only $4 to $6 million.

As dissenting Judge Kavanaugh of the court of appeals emphasized, these figures demonstrate that EPA's regulation "costs nearly $1500 for every $1 of health and environmental benefit produced." App. 84a. The costs will be passed on to consumers of electricity throughout the country. And although no reasonable person would spend $1,500 for $1 of benefit, EPA claims the grossly disproportionate costs and benefits should be ignored when deciding whether it is "appropriate" to regulate electric utilities. Certiorari is warranted due to the extraordinary costs to consumers from EPA's rule.

B. Ancillary "co-benefits" are not relevant benefits for the purpose of determining whether it is appropriate to regulate electric utilities.

In addition to calculating the monetized annual benefits from reducing HAP emissions, EPA also estimated that the rule will result in fewer emissions of particulate matter smaller than 2.5 micrometers in diameter ($PM_{2.5}$) and sulfur dioxide, a $PM_{2.5}$ precursor. EPA estimated that the annual "co-benefits" from reducing $PM_{2.5}$ are between $36 and $89 billion. 77 Fed. Reg. at 9306; *id.* at 9305 ("The great majority of the estimates are attributable to co-benefits from reductions in $PM_{2.5}$-related mortality."); *id.* at 9323 ("the estimated HAP benefits are small in relation to the co-benefits achieved through reductions in non-HAP air pollutants, such as PM and SO2"). According to respondents EPA and Calpine Corporation, these estimates indicate that EPA would have found it appropriate to regulate electric utilities even if it had weighed the costs and benefits of regulation. EPA Opp. 28; Calpine Opp. 15.

The respondents miss the point. The ancillary co-benefits from lower $PM_{2.5}$ emissions are not *relevant* benefits for the purpose of deciding whether it is appropriate to regulate HAP emissions from electric utilities. In § 7412(n)(1)(A), Congress directed EPA to determine whether reducing hazardous-air-pollutant emissions (not $PM_{2.5}$) is "appropriate." § 7412(n)(1)(A) (addressing emissions of "pollutants listed under subsection (b) of this section"). The scope of the "appropriate" finding is therefore limited to the costs and benefits of reducing HAP emissions; co-benefits from fewer $PM_{2.5}$ emissions play no role in

that analysis. If EPA had made the "appropriate" finding correctly, it would have found that the staggering costs to consumers and the small public-health benefit show that regulating electric utilities is *not* appropriate. This Court should grant the petition for a writ of certiorari so that EPA can properly take into account the national economic impact of regulation.

II. Respondents' claims that EPA reasonably interpreted "appropriate" are wrong.

Respondents provide a variety of arguments on the merits in an attempt to avoid the central point of this case: it is not appropriate to regulate electric utilities when the costs and benefits of EPA's rule are so grossly mismatched. None of respondents' arguments are sound.

A. EPA misreads the administrative record and thereby fails to acknowledge that its interpretation of "appropriate" did not give that term any meaning.

In its explanation of how it interpreted "appropriate," EPA made a fundamental error when it stated it "*must* find that it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment." 76 Fed. Reg. 24,976, 24,988 (May 3, 2011) (emphasis added). As the states explained in their petition, EPA's interpretation is unreasonable because it fails to give the term "appropriate" any meaning.

Congress directed EPA to take two critical steps before it may regulate HAP emissions from electric

utilities. First, Congress instructed EPA to conduct a study of "the hazards to public health reasonably anticipated to occur as result of emissions" of HAPs from electric utilities after imposition of all the other requirements of the Act. § 7412(n)(1)(A). Second, Congress provided that EPA shall regulate electric utilities under § 7412, but only if, "after considering the results of the study," it also determined that such further regulation is both "appropriate" and "necessary." *Id.*

The plain language of § 7412(n)(1)(A) therefore establishes that identifying a hazard to public health is not sufficient for EPA to regulate. If the study shows there is a hazard to public health from HAPs emitted by electric utilities, EPA is to consider those results, and "after" doing so, exercise its judgment and make an additional finding of whether regulation is "appropriate" and "necessary." By imposing this second step, Congress intended EPA to weigh important factors beyond health hazards (such as costs) when deciding whether regulation is appropriate. EPA, however, failed to exercise its judgment based on its mistaken view that it "*must* find it is appropriate to regulate EGUs if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment." 76 Fed. Reg. at 24,988 (emphasis added).

In its brief in opposition, EPA paraphrases this key portion of the administrative record and changes its central meaning by substituting "may" for "must." EPA states: "The EPA further explained that it *may* find regulation to be 'appropriate' based 'on a finding that any single [hazardous air pollutant] emitted

from power plants poses a hazard to public health or the environment.'" EPA Opp. 9 (citing 76 Fed. Reg. at 24,988) (emphasis added).

EPA's paraphrasing contradicts what it actually said. EPA unreasonably interpreted "appropriate" to *require* regulation based solely on identifying a hazard to public health or the environment from HAPs emitted by EGUs. EPA failed to exercise its judgment as Congress required in § 7412(n)(1)(A), and this Court should grant the petition for a writ of certiorari to correct this clear error.

1. EPA's reference to the availability of controls is immaterial to its interpretation of "appropriate."

EPA asserts that it did not find regulation of electric-utility emissions to be "appropriate" based solely on having identified a hazard to public health or the environment. As support, it notes the following statement from the proposed rule: "Finally, we may conclude that it is appropriate, in part, to regulate EGUs if we determine that there are controls available to address HAP emissions from EGUs." 76 Fed. Reg. at 24,988; see also EPA Opp. 26 (quoting the proposed rule).

The availability of controls, however, had no effect on EPA's finding that regulation is appropriate, given EPA's prior statement in the same passage that it "must" regulate "if it determines that any single HAP emitted by utilities poses a hazard to public health or the environment." Once EPA identified a hazard to public health or the environment, it determined (mistakenly) that

regulation was automatically required; the availability of controls had no bearing on whether regulation is appropriate. If, on the other hand, EPA had not identified any hazard, the mere fact that controls would be available to address HAP emissions that do not cause hazards would not make regulation appropriate under § 7412. EPA's statement asserting that it may regulate if controls are available is thus irrelevant surplusage, given its prior determination that it *must* regulate if there is a public-health hazard, and does not change the conclusion that it unreasonably interpreted "appropriate" by failing to give that term any meaning.

2. An "appropriate" finding requires more than an analysis of the health effects from EGU HAP emissions.

EPA claims it gave meaning to "appropriate" by evaluating the severity of the hazards to public health. EPA Opp. 26 n.15. But that assertion contradicts EPA's statement that it "must" find it is appropriate to regulate EGUs if it finds that any single HAP emitted by power plants poses a hazard to public health or the environment. 76 Fed. Reg. at 24,988.

Moreover, Congress required that EPA do more than analyze the extent of any health hazards. It instructed EPA to regulate electric utilities only if, "after considering the results of the study" of hazards to public health from electric-utility-HAP emissions, EPA makes the additional finding that regulation under § 7412 is "appropriate" and "necessary." § 7412(n)(1)(A). If EPA determines a health hazard

exists that is more than *de minimis*, it is then required to perform a separate analysis of whether regulating HAPs emitted from electric utilities is "appropriate" based on relevant factors—factors beyond health hazards—and that necessarily includes weighing the costs of reducing those emissions against the benefits to public health from such reductions.

As dissenting Judge Kavanaugh emphasized, the goal of § 7412(n)(1)(A) is to provide "'protection of the public *while avoiding the imposition of excessive and unnecessary costs on residential, industrial, and commercial consumers of electricity.*'" Pet. App. 87a (quoting the sponsor of the House Bill that was eventually enacted, Congressman Oxley) (emphasis provided by Judge Kavanaugh). It is not sufficient for EPA merely to assess the health hazards from HAPs emitted by electric utilities. EPA unreasonably interpreted "appropriate" when it refused to exercise its judgment by weighing the costs and benefits of regulation.

B. The statutory scheme also demonstrates that EPA's interpretation of the word "appropriate" is unreasonable.

EPA claims its refusal to consider costs is supported by other statutory provisions in § 7412. In fact, those provisions compel the opposite conclusion: Congress treated electric utilities differently from other sources of HAP emissions and directed EPA to consider costs when deciding whether it is "appropriate" to regulate electric utilities.

The primary statutory provision on which EPA relies is § 7412(c)(1). It states that EPA is required to publish a list of categories of all "major sources" other than electric utilities, and to promulgate emissions standards for each listed category. Whether a facility is a "major source" is based on whether its HAP emissions exceed specific numeric amounts: 10 tons per year or more of any single hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. § 7412(a)(1). Regulation of major sources other than electric utilities is therefore based solely on whether their HAP emissions exceed those numeric thresholds.

The key point about § 7412(c)(1) is that it applies to major sources *other than electric utilities*; Congress expressly decided in § 7412(n)(1)(A) to treat electric utilities differently. The stark contrast between the criteria for regulating electric utilities versus other major sources demonstrates that in § 7412(c)(1) Congress expressly precluded EPA from considering costs when regulating sources other than electric utilities, whereas in § 7412(n)(1)(A) Congress intended that EPA exercise its judgment—and thus to consider costs—when deciding whether regulation is appropriate. EPA's reliance on § 7412(c)(1) is misplaced.

The criteria in § 7412(d)(2) for setting emission standards beyond the minimum level required also do not support EPA's interpretation of "appropriate." Under that provision, EPA is to promulgate "beyond-the-floor" emission standards for all listed major sources based on the "maximum achievable control

technology" or "MACT." The beyond-the-floor MACT standards are based on the maximum degree of reduction in HAP emissions the Administrator determines is achievable, "taking into consideration," among other things, "the costs of achieving such emission reduction." § 7412(d)(2). EPA contends that this provision shows that, with regard to costs, Congress intended EGUs to be treated the same as all other major sources.

EPA again ignores the critical differences in § 7412(n)(1)(A) and the fundamental point that Congress treated electric utilities differently from other major sources by making regulation dependent on the results of the study and EPA's subsequent determination that regulation is "appropriate." As dissenting Judge Kavanaugh emphasized, if Congress had intended for EPA to consider the costs of regulating electric utilities only when setting beyond-the-floor MACT standards, and not to consider costs when making the threshold finding of whether it is "appropriate" to regulate them at all, it would have done one of two things: "It would have either automatically regulated electric utilities under the MACT program, as it did with other sources, or provided that regulation under the MACT program would be automatic if the three-year study found that these sources indeed emitted hazardous air pollutants." App. 85a–86a. The fact that Congress declined to adopt either of these options, and instead required EPA to regulate electric utilities "under the MACT program" only if it finds such regulation is appropriate, "reinforces the conclusion that Congress intended EPA to consider costs in deciding whether to regulate electric utilities at the threshold, and not

simply at the second beyond-the-floor stage of the MACT program." App. 86a.

EPA also overlooks the distinct language in § 7412(n)(1)(A) when it relies on *Whitman*. That case involved national ambient air quality standards that, under 42 U.S.C. § 7409(b)(1), EPA is to set "requisite to protect the public health" with an "adequate margin of safety." The Court determined that those terms do not allow EPA to consider the costs of implementing the standards when setting them. Because costs are "*both* so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects," that Congress would surely have mentioned costs if they were to be considered in setting the standards. *Whitman*, 531 U.S. at 469 (emphasis in original). Those terms, therefore, neither explicitly nor implicitly allowed for the consideration of costs.

Unlike the limiting phrases "requisite to protect the public health" and "adequate margin of safety," both of which focus solely on the *benefits side* of the cost-benefits balance, the key statutory criteria in § 7412(n)(1)(A) is whether regulating electric utilities is "appropriate." That broad term imposes no limitations; to the contrary, it encompasses relevant factors on *both* sides of the cost-benefit balance, including the public-health benefits of regulating electric utilities and the costs of doing so. In other words, when Congress enumerates only benefits-side factors, like protecting public health, it presumably intends to preclude consideration of cost-side factors that would cut directly against protecting public health. But when Congress asks EPA to determine if

regulating is "appropriate," without enumerating *any* factors, it intends for EPA to consider costs too. Thus Congress was not silent on whether EPA must consider costs; by directing EPA to regulate electric utilities if it finds regulation is "appropriate," Congress intended that EPA consider the costs of regulation when making that finding.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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